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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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| ELLIS SHELTON, | : | |
| Petitioner | : | Miscellaneous Docket No. A-334 |
| V. | : | No. 77-5708 |
| STATE OF OHIO, | : | |
| Respondent | : | |

ON APPEAL FROM SUPREME COURT OF OHIO

# JURISDICTIONAL STATEMENT OF PETITIONER

ELLIS SHELTON Pro Se Assisted by
ALLEN BROWN as Volunteer Counsel
at the request of Ohio Civil
Liberties Union
216 E. 9th Street, Fifth Level
Cincinnati, Ohio 45202

VOLUNTEER COUNSEL FOR
PETITIONER

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VOLUNTEER COUNSEL FOR
PETITIONER

Ellis Shelton respectfully submits this brief on his behalf in propria persona. He is assisted herein by Allen Brown of the Ohio Bar acting as volunteer counsel, solely for the purposes of submitting this jurisdictional statement at the request of the Ohio Civil Liberties Union. Despite such volunteer assistance and for the preservation of issues hereinafter raised, the petitioner desires this jurisdictional statement to be deemed as if filed pro se.

## OPINIONS BELOW

The opinion of the Supreme Court of Ohio, reported as 51 Ohio St. 2d 68, is reproduced in the Appendix A hereto.

## JURISDICTION

Jurisdiction of this court is invoked in 28 U. S. C. Section no. 1257 (3) and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the Petitioner having asserted below and in this Court a denial of right secured to him by the Constitution of the United States except as to the assertion of that right of counsel for appellate purposes, said right arising as an issue of constitutional level following completion of the appeal to the Supreme Court of Ohio.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves certain provisions of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, the Ohio statutes governing the infliction of the penalty of death,

A. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION:
In pertinent part, the Sixth Amendment provides:
"In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by . . . jury."

B. THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION:
"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

C. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In pertinent part, the Fourteenth Amendment provides:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

D. THE OHIO AGGRAVATED MURDER STATUTES:

§2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§2929.02 Penalties for murder

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to



imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

§2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the

indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

§2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:



(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has b been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death

penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

* * * * * * *

OHIO RULES OF CRIMINAL PROCEDURE RULE 11. Pleas, Rights Upon Plea

* * * *

(4) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense



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is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

* * * *

## QUESTIONS PRESENTED

1. Does the denial of the Supreme Court of Ohio for an appointment of counsel for purposes of pursuing an appeal raising a significant and unresolved federal constitutional question, from the Supreme Court of Ohio to the Supreme Court of the United States for an indigent person under sentence of death constitute such abuse of discretion as to violate the Sixth Amendment to the United States Constitution?

2. Does Ohio's statutory scheme for the imposition of the death sentence for aggravated murder violate various provisions of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

## STATEMENT OF THE CASE

On or about November 26, 1974 at approximately 11:45 P. M. in the City of Cincinnati, one, Lloyd Adkins, was shot and killed at 303 Warner Street, Hamilton County, Ohio while a patron at the Warner Cafe. The Warner Cafe was a small, family-type pub located on Warner Street in Clifton Heights, Cincinnati, Ohio. The evidence showed decedent usually frequented the cafe after work and had one or two beers this particular evening. The time was approximately 11:45 p. m. to 12:15 a. m. Two men entered wearing stocking masks over their faces, one taller than the other. The short man walked to the rear of the cafe and confronted a patron and the owner at that location. The tall man, carrying a shotgun, stationed himself in the front of the cafe. The decedent was seated on a bar stool at the bar in the front location in close proximity where the tall man stopped. Decedent left his seat, grabbed for the gun, and state, "Oh, no, you don't". The evidence indicated there was a struggle

for the gun, that the decedent was pushed back, and the gun discharged, and the decedent fell fatally wounded. The two men left precipitously thereafter without obtaining any money or other property.

The shotgun was subsequently found on a hill off of Kirby Road, a thoroughfare in the City of Cincinnati, State of Ohio. The owner of the gun, one Kenneth Carter, was later identified and brought to Cincinnati Police Headquarters for questioning. He gave a statement and later testified at the trial that he had sold the gun to the defendant and one Leroy Bates; that this transaction took place on November 26, 1974, the same day as the slaying; around 5:30 or 6:00 p. m.; that around 1:30 - 2:00 a. m. on the morning of the 27th, he received a telephone call from Leroy Bates requesting that he come to Bates' apartment and take the shotgun back; that defendant Shelton had killed some man with it. He did not go to pick up the gun.

The sister of Leroy Bates testified that defendant Shelton and Bates were at her house the afternoon and night of the killing; that she saw defendant bring the shotgun upstairs after he purchased it from the owner, Kenneth Carter; that she went to bed while Leroy Bates and defendant were still in her apartment. She later awoke as a result of hearing sirens in the vicinity; that Leroy Bates and defendant were in her apartment and defendant had blood on his coat and hands. She testified that defendant stated that he had killed a man with the shotgun.

The brother of Leroy Bates testified that he saw defendant obtain the gun from the owner, Kenneth Carter.

Ellis Shelton was indicted for violation of Ohio Revised Code 2903.01 (aggravated murder). On May 2, 1975, represented by appointive counsel, he was tried by jury and convicted. Thereafter, the sentencing judge who presided over his trial sentenced him to the electric chair on November 8, 1975. Notice of appeal of the Court of Appeals of the First Appellate District of the State of Ohio was filed on October 16, 1976 and the case was decided December 20, 1976. On January 10, 1977, the defendant-appellant filed appeal to the Supreme Court of Ohio. On July 13, 1977 the



Supreme Court of Ohio announced its decision affirming the conviction (See Appendix A appended hereto). On the 18th day of August, 1977, the defendant-appellant gave notice of appeal to this court, being no longer represented by appointive counsel as in previous proceedings. He gave such notice in propria persona (See Appendix B hereto). He simultaneously made application to said court for appointment of counsel for the purpose of such further appeal (See Appendix C accompanied by Affidavit of Indigency. The Supreme Court of Ohio did not respond to ~~such~~ motion. The defendant-appellant sought aid of the Ohio Civil Liberties Union which in turn sought out and obtained the volunteer counsel for the purposes of assisting in the filing of this jurisdictional statement. On October 12, 1977 this court extended the docketing of this case to November 10, 1977.

## HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

A motion attacking the constitutionality of the Ohio death penalty statutes under Sixth, Eighth and Fourteenth amendment grounds was filed in the trial court and denied. The same challenge was made in the Court of Appeals and denied. The Ohio Supreme Court rejected the same assertions (See Appendix A hereto). The question of appointive counsel for purposes of the appeal from the Supreme Court of Ohio to the Supreme Court of the United States did not, however, arise until the declination of the Supreme Court of Ohio to appoint counsel as set forth heretofore in the Statement of the Case.

## SUBSTANCE OF THE FEDERAL QUESTION

This case involves an evaluation of Ohio's aggravated murder statutes and modes of imposing the death sentence thereon not heretofore reviewed by an federal court. There is presently pending before this court at least two cases known to the petitioner which constitute consideration on the federal constitutional merits of Ohio Statues which first became effective in 1974. This case is therefore, along with the noted companion cases still undetermined, a cause of initial impact as to the sufficiency of federal consti-

tutional requirements as applied to Ohio's death penalty statutes and Ohio's modes of imposing the death sentence.

SUMMARY OF ARGUMENT

I. The Ohio Capital Punishment Statutes as further elucidated under the Ohio Rules of Criminal Procedure are unconstitutional in the following particulars:

(A) The scheme of adjudication of mitigating circumstances penalizes an election to try one's case to a jury by altering the determination of mitigating circumstances from an unanimous decision of a three-judge tribunal for persons who elected to try their case before a three-judge tribunal to a singular judgment of a single presiding judge for a person who has elected to try his case to a jury.

(B) The scheme does not preclude prosecutory, judicial or jury untrammelled discretion, particularly in a felony murder as in the instant case.

(C) Definitions of mitigating circumstances as interpreted by the Ohio Supreme Court has resulted in a situation where mitigating factors cognizable by modern man are not subject to consideration.

(D) The scheme violates due process in making the question of determination of death be conducted at a lower level of required proof and burden of proof than the question of guilt.

II. Ohio's declination to provide appointive counsel for an established indigent's full exhaustion of all appellate potential in a capital case involving an original instance of an application of a non federally reviewed new death statute enacted Post-Furman constitutes such abuse of discretion as to be violative of the Sixth Amendment to the United States Constitution.



ARGUMENT

THE OHIO CAPITAL PUNISHMENT STATUTES AS FURTHER ELUCIDATED UNDER THE OHIO RULES OF CRIMINAL PROCEDURE ARE UNCONSTITUTIONAL IN THE FOLLOWING PARTICULARS: THE SCHEME OF ADJUDICATION OF MITIGATING CIRCUMSTANCES PENALIZES AN ELECTION TO TRY ONE'S CASE TO A JURY BY ALTERING THE DETERMINATION OF MITIGATING CIRCUMSTANCES FROM A UNANIMOUS DECISION OF A THREE-JUDGE TRIBUNAL FOR PERSONS WHO ELECTED TO TRY THEIR CASE BEFORE A THREE-JUDGE TRIBUNAL TO A SINGULAR JUDGMENT OF A SINGLE PRESIDING JUDGE FOR A PERSON WHO HAS ELECTED TO TRY HIS CASE TO A JURY.

The provisions of Ohio's technique for imposing the death sentence provides under 2929.03 (C) (1) and (2) a mode of variance in who shall try the sentencing proceedings. If an accused in the original trial of his cause elects to be tried by jury rather than a three-judge panel he forfeits the consideration of more than one mind on the issues to be considered in whether the death sentence should be imposed. Since a fact finding process is involved in the sentencing procedure that justificatory apparatus that guarantees a right of the interplay of points of view and value systems that is the jury as guaranteed by the Sixth Amendment is forfeit in what is perhaps the most significant fact finding in the entire procedure. An accused must reckon, even gamble, with the differing sentencing issues to be determined by a fact finding body on two levels, and if he selects a right guaranteed to him by the Sixth Amendment on the issues of finding of guilt or innocence, he loses the interplay of dialogue between fact finders on the issue of his death, an area where trial is critically important. This inevitably has a chilling effect on the selection of a jury as a mode of trial where, as in this case, the defendant has a slightly differing issue on a traditionally fortuitous felony murder on the question of guilt and innocence and on the question of Ohio Revised Code 2929.04, (B) (1) "the victim of the offense induced or facilitated it." See United States v. Jackson, 390 U. S. 570(1968); Rainsberger v. Fogliani 380 Federal 2d 783.

THE SCHEME DOES NOT PRECLUDE PROSECUTORY, JUDICIAL OR JURY UNTRAMMELLED DISCRETION, PARTICULARLY IN A FELONY MURDER AS IN THE INSTANT CASE

Nothing in Ohio's statutory scheme is preventive of the unseen factors of prejudice or excess of mercy which would effect whether a case is carried forward to a death penalty on the untrammelled judgment of an arresting officer, a grand jury, a prosecutor, a judge or even a jury compromising an unspoken issue of death by failing to find the secondary specification. It might well be argued that nothing in statutory law can safely preclude such judgmentary approach and its inevitable reflection of different attitudes as to racial group or society of an accused. However, Ohio, under the provisions of Ohio Rules of Criminal Procedue, Rule 11, subparagraph (4), puts an imprimatur of judicially condoned conduct as a means of escaping the death penalty.

In Furman v. Georgia 408 U. S. 238 (1972) and in Gregg v. Georgia 428 U. S. 153 (1976), and similar cases, this court has been attempting to hone the extremely narrow and difficult path between certitude of punishment and regard for human life on an equal basis. It is contraindicative to the creation of such a path to vest in the court an uninhibited authority save for the court's own recognition of "interests of justice". The problems of the past on the unequality of the death sentence have arisen when one deeply considers them, not on the issue of to whom is administered the death penalty but rather to whom is spared the death penalty. To grant the power of sparing with no standards save "interests of justice" is to undermine and make a hollow shell the entire statutory scheme of Ohio, at the whim of a presiding judge.

DEFINITIONS OF MITIGATING CIRCUMSTANCES AS INTERPRETED BY THE OHIO SUPREME COURT HAS RESULTED IN A SITUATION WHERE MITIGATING FACTORS COGNIZABLE BY MODERN MAN ARE NOT SUBJECT TO CONSIDERATION

The argument in relation to Ohio definitions of mitigating circumstances has been exhaustively set forth in Case No. 76-653 Willie Lee Bell v. State of Ohio, presently pending before this court on its merits. Two factors however of mitigating factors appropriate to this appellant should be discussed in addition. In Woodson v. North Carolina 428 U. S. 280 (1976), this court recog-



nized the absurdity of proceeding in any mitigation hearing which did not take into consideration the totality of a human being's personality and his contribution to society other than his dereliction, no matter how severe in the given instant. Such evaluation is both relevant and a civilized consideration toward the question of whether one's life is forfeit. This given defendant appellant under Ohio scheme had no opportunity to offer such to the court, and he is sentenced to death as a symbol and not as a person.

Perhaps more compelling as a matter of constitutional rather than philosophical moment is that the Supreme Court of Ohio in its opinion attached hereto as Appendix A has offered no clear interpretation as to whether a tragically fortuitous felony murder falls within the provision of the preclusions of the death penalty provided under 2929.04 (B) (1). In the instant case there was a variance on the evidence as to whether the shooting was defensive, accidental or deliberate. In any of the foregoing circumstances it was a felony murder and the defendant would have been convicted under the provisions of 2903.01 subparagraph (B). In relation, however, to the imposition of the death sentence and its efficiency as a deterrent, a thoughtful person cannot be totally immune to an absence of distinction at least effecting mitigation between the fortuitous or even tainted instinct for self-preservation and the willful felony murder. Ohio has apparently precluded by its opinion in this case where such factors are subject to consideration under 2929.04 (B) (1) or (2).

THE SCHEME VIOLATES DUE PROCESS IN MAKING THE QUESTION OF DETERMINATION OF DEATH BE CONDUCTED AT A LOWER LEVEL OF REQUIRED PROOF AND BURDEN OF PROOF THAN THE QUESTION OF GUILT.

In re Winship 397 U. S. 358 (1970) indicates that the reasonable doubt requirement is guaranteed by the due process clause of the Fourteenth Amendment. This is in the context of proof of

culpability. In relation to punishment traditionally the burden has been altered. Considering, however, the logic of Ohio's death penalty scheme and the irretrievability of the death sentence no valid distinction exists between a level and burden required of culpability from the level and burden of proof required for the imposition of death. Ohio's scheme makes the death penalty mandatory except upon the showing of exclusionary circumstances. If proof beyond a reasonable doubt is logically required for invoking a totality, is it then not logically inevitable that there must be preclusion beyond a reasonable doubt of that inevitability. All previous discussions of burdens of proof or duties of persuasion have been within the context of a span of sentencing and a right of continued existence. We are now discussing it in this context on an absolutistic sentencing and an end of existence or consciousness. It is absurd to have a stricter standard of proof to establish base and absolute culpability and then to reduce to a lesser standard of proof as to whether that maximum result is appropriate. Ohio's scheme when it has graduated the consequence, and consequences essentially are what have given birth to the doctrine of proof beyond a reasonable doubt in criminal cases, creates a lesser standard of proof when it ultimately escalates the consequences. We are not dealing here with a judgment within a scale of a minimum to a maximum. We are dealing with a mandatory ultimate maximum defeated only by exception. Again the court is referred to the more exhaustive considerations of this issue contained in the briefs for petitioners and all amici in the following cases presently pending before this court, i. e. Willie Lee Bell v. State of Ohio No. 76-6513 and Ricardo Woods and Roland Reaves v. State of Ohio No. 76-1308

**OHIO'S DECLINATION TO PROVIDE APPOINTIVE COUNSEL FOR AN ESTABLISHED INDIGENT'S FULL EXHAUSTION OF ALL APPELLATE POTENTIAL IN A CAPITAL CASE INVOLVING AN ORIGINAL INSTANCE OF AN APPLICATION OF A NON FEDERALLY REVIEWED NEW DEATH STATUTE ENACTED POST-FURMAN CONSTITUTES SUCH ABUSE OF DISCRETION AS TO BE VIOLATIVE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION**



The issue raised herein first appeared as an issue of constitutional merit following the Supreme Court of Ohio's failure to appoint counsel for purposes of appeal to this court for the petitioner, although timely application was made to such purpose. (See Appendix C) Its late appearance might be sufficient for remand to such Supreme Court of Ohio for the purpose of appointing counsel, before further consideration of this application for certiorari. If such is deemed appropriate the court is hereby requested to treat this aspect of the jurisdictional statement as if a motion to such purpose or as if a motion for appointment of counsel by this body with appropriate reference to the Affidavit of Indigency filed herein in support of the application to proceed in forma pauperis.

The right of appointive counsel in Gideon v. Wainwright 372 U. S. 335 (1963) was established and affirmed in Douglas v. California 372 U. S. 353 (1963). Recent authority has however made a distinction between appeals as a matter of right and appeals as a matter of allowances. Without contesting such distinction the circumstances of this unique proceeding are such that the appeal in this instance has no realistic difference from an appeal of right. We have first, an established indigent. We have, second, no previous ultimate federal review of the death statute as enacted by Ohio following the announcement of strict federal constitutional standards of the Furman case. We have, third, a sentence of death. Considering all the foregoing factors it is an abuse of the discretionary power of appointment, rising to the level of a violation of the Sixth Amendment right of counsel to deny this appellant assistance of counsel at this juncture. The ultimately adjudicable rights asserted are too sensitive and too unresolved to make an absence of counsel other than a substantive deprivation.

## CONCLUSION

For the reasons stated heretofore it is evident that substantial federal questions exist and are unresolved in the circumstances of the capital sentence imposed on the petitioner by the State of

Ohio and that this court should consider on its merits the judgment of the Ohio Supreme Court or take such other action as is appropriate within the circumstances stated herein, construing this jurisdictional statement as an appropriate motion for other relief.

Respectfully submitted,

Ellis Shelton By Allen Brown
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at the request of Ohio Civil
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Cincinnati, Ohio 45202

VOLUNTEER COUNSEL FOR PETITIONER



Appendix "A"

THE STATE OF OHIO, APPELLEE, *v.* SHELTON, APPELLANT.

[Cite as State v. Shelton (1977), 51 Ohio St. 2d 68.]

*Criminal law—Aggravated murder—Conspiracy—Evidence—Declaration of conspirator—Admissibility against co-conspirator.*

1. A conspiracy to commit a crime does not necessarily end with the commission of the crime.
2. A declaration of a conspirator, made subsequent to the actual commission of the crime, may be admissible against any co-conspirator if it was made while the conspirators were still concerned with the concealment of their criminal conduct or their identity. (*State* v. *DeRighter*, 145 Ohio St. 552, approved and followed.)

(No. 77-127—Decided July 13, 1977.)

APPEAL from the Court of Appeals for Hamilton County.

On January 24, 1975, the Hamilton County grand jury returned a two-count indictment, with a specification. The first count charged Leroy Bates and the defendant, Ellis Shelton, with purposely causing the death of Lloyd Adkins while attempting to commit aggravated robbery in violation of R. C. 2903.01.

The specification to the first count stated that the offense contained in the first count was committed while Bates and Shelton were attempting to commit aggravated robbery.

The second count charged the pair with attempted aggravated robbery, as defined by R. C. 2911.01 and in violation of R. C. 2923.02.

In a separate trial, Shelton was found guilty on each count and the specification. Following a psychiatric examination and a presentence probation report, a mitigation hearing was conducted. The court found an absence of any mitigating factors, and on October 8, 1975, Shelton was sentenced to death on the first count and the specification thereto. On the second count, he received a sentence for a term of years.

The Court of Appeals affirmed the conviction and sentence.

The cause is now before this court upon an appeal as of right.

*Mr. Simon L. Leis, Jr.*, prosecuting attorney, *Mr. Thomas P. Longano* and *Mr. Robert R. Hastings, Jr.*, for appellee.

*Mr. Donald L. Weber* and *Mr. Daniel Reif*, for appellant.

O'Neill, C. J. On November 25, 1974, the defendant and Bates apparently agreed to rob the Warner Tavern in Cincinnati, Ohio. After deciding that a gun was necessary, Shelton purchased a .12 gauge J. Stevens single barrel shotgun from Kenneth Carter. Shortly after midnight on the morning of November 26, the defendant and Bates entered the Warner Tavern. Both men were wearing stocking masks. Shelton was armed with the shotgun.

Mrs. Lois J. Wells was tending bar and talking to Robert Schultheis who was seated at the bar in the rear part of the barroom. Lloyd Adkins, an off-duty Pinkerton guard, was seated at the bar near the front entrance. Adkins and Schultheis were approximately 18 feet apart.

Leroy Bates proceeded to the rear of the tavern where Schultheis was seated. The defendant approached the center portion of the bar. Mrs. Wells asked the man what he wanted, whereupon Shelton raised the shotgun over the bar and pointed it at her. Mrs. Wells responded, "All right, I know what you want."

When Bates started to move around to Mrs. Wells' side of the bar it was her intention to let him take the money. As Mrs. Wells moved to the rear of the bar, she heard Adkins say to Shelton, "Oh, no you don't." She then turned and looked toward the front of the tavern where Shelton and Adkins were struggling. Shelton knocked Adkins off balance, stepped back, and fired a fatal shot. Both Bates and Shelton then fled the tavern.

At approximately 1:30 A. M. on November 26, 1974, Kenneth Carter received a telephone call from Leroy Bates. Bates asked Carter to "Come and get that shotgun," and said that Shelton had shot a man with it. Carter refused to take the gun.

The record reflects that when Bates was unsuccessful in his attempt to convince Carter to reclaim the murder weapon, he wrapped the shotgun in a towel and attempted to dispose of it in an area near Mt. Airy Forest. The gun and towel were later found.

Both Bates and Shelton were arrested soon after the killing. During the trial of the defendant, the state presented an overwhelming amount of evidence pointing to the defendant's involvement in the commission of the aggravated robbery and murder.

I.

Appellant advances three propositions of law; the first two are summarized as follows:

1. The trial court substantially erred to the prejudice of appellant in denying his motion to dismiss for the reason that the provisions of R. C. 2903.01, 2929.02, 2929.03 and 2929.04 unconstitutionally permit arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

2. The trial court substantially erred to the prejudice of appellant in denying his motion to dismiss for the reason that the death penalty imposed by R. C. 2929.04 constitutes cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution and Section 9, Article I of the Ohio Constitution.

These propositions of law were rejected by this court in *State* v. *Bayless* (1976), 48 Ohio St. 2d 73, 357 N. E. 2d 1035. See, also, *State* v. *Black* (1976), 48 Ohio St. 2d 262, 358 N. E. 2d 551, and *State* v. *Downs* (1977), 51 Ohio St. 2d 47.



II.

Appellant's third proposition of law states:

The trial court erred in allowing in evidence, over defendant's timely objection, testimony by a state's witness regarding an alleged telephone conversation between the witness and a co-conspirator, which testimony constituted an extra-judicial declaration of the co-conspirator, made in the absence of the defendant, out of the defendant's presence, without the defendant's knowledge, after the termination of the conspiracy and which tended to prove the guilt of the defendant.

After the shooting, the defendant and Leroy Bates fled from the Warner Tavern. They ran through the Fairview School yard and then back to Connie Bates' apartment on Wheeler Street. Connie Bates saw the defendant in her bathroom washing blood from his hands. He also had blood on his fatigue jacket and on his pants.

At approximately 1:30 A. M., Carter received a telephone call from Leroy Bates. In recalling the conversation during the trial, Carter's testimony proceeded as follows:

"Q. Later on that evening did anything happen to bring your attention back to this particular gun?

"A. About 1:30 or something, I received a call from Leroy Bates; and he told me, 'Come and get the shotgun.'

"Mr. Weber: Objection as to any conversation.

"The Court: Overruled.

"Q. What did he say to you on the phone call?

"A. He told me 'Come and get the shotgun,' that Ellis had shot a man with it.

"Q. What did you say to him?

"A. I told him to keep the gun, I didn't want it."

Appellant claims the court's ruling as error. As a general rule, he contends, the incriminating, inculpatory, extrajudicial declarations of a conspirator, after termination of the common purpose and in the absence of or without the knowledge of his fellow conspirators, do not bind the nondeclarants and such statements are inadmissible to prove the participation of co-conspirators in the crime charged. Applying this rule to the case at bar, appellant continues, Carter's testimony was inadmissible. Appellant argues that at the time of the alleged telephone conversation, the conspiracy to rob had terminated and the conspiracy was, therefore, at an end; and that the alleged conversation took place out of the presence of the defendant, and was sufficiently remote in time from the commission of the criminal act charged as to not be appropriately considered as part of the *res gestae*. Consequently, appellant contends the admission of such testimony requires that his conviction be reversed.

Subject to certain exceptions, this court finds little complaint with the appellant's abstract principle of law. In *Patton* v. *State* (1856), 6 Ohio St. 468, this court stated in paragraph one of the syllabus:

"The acts and declarations of a conspirator may, after sufficient proof of conspiracy, be given in evidence to charge his fellow-conspirator, but subject always to the *limitation* that the acts and declarations admitted be those only which were made and done during the pendency of the criminal enterprise, and in furtherance of the common object." Accord *Rufer* v. *State* (1874), 25 Ohio St. 464; *Kent* v. *State* (1884), 42 Ohio St. 426; *Neighbours* v. *State* (1930), 121 Ohio St. 525, 169 N. E. 839. See, also, 4 A. L. R. 3d 671.

However, it is well recognized that the conspiracy does not necessarily end with the commission of the target crime. Thus, a subsequent declaration of a conspirator may be admissible against any co-conspirator if it was so proximate, in terms of time and place, as to be within the *res gestae*; if the conspirators were still concerned with the concealment of their criminal conduct or their identity; or if the fruits of the crime had not been disposed of by, or divided among, the conspirators. 3 Wharton's Criminal Evidence (13 Ed.), 338, Section 643.

In addressing the issue of concealment, this court, in *State* v. *DeRighter* (1945), 145 Ohio St. 552, at 558, 62 N. E. 2d 332, summarized the rule as follows:

"'The acts and declarations of a conspirator are admissible against the co-conspirator when they are made during the pendency of the wrongful act, and this includes not only the perpetration of the offense, but also its subsequent concealment. The theory for the admission of such evidence is that persons who conspire to commit a crime, and who do commit a crime, are as much concerned, after the crime, with their freedom from apprehension, as they were concerned, before the crime, with its commission; the conspiracy to commit the crime devolves after the commission thereof into a conspiracy to avoid arrest and implication.' " Accord *Dailey* v. *State* (1936), 233 Ala. 384, 171 So. 729; *Hooper* v. *State* (1933), 187 Ark. 88, 58 S. W. 2d 434; *Reed* v. *People* (1965), 156 Colo. 450, 402 P. 2d 68; *Smith* v. *State* (1933), 47 Ga. App. 797, 171 S. E. 578; *State* v. *Borserine* (1959), 184 Kan. 405, 337 P. 2d 697; *Allen* v. *Commonwealth* (1917), 176 Ky. 475, 196 S. W. 160; *People* v. *Mol* (1904), 137 Mich. 692, 100 N. W. 913; *Watson* v. *State* (1933), 166 Miss. 194, 146 So. 122; *State* v. *Strait* (1925), 311 Mo. 604, 279 S. W. 109; *State* v. *Gauthier* (1925), 113 Ore. 297, 231 P. 141.

The court finds the principles of *DeRighter* dispositive of this issue. Approximately an hour after the shooting, an accomplice in the instant case made a statement implicating the defendant while he, the accomplice, was trying to dispose of the murder weapon. Under such conditions such statements are admissible. Moreover, in light of the overwhelming evidence of the defendant's guilt, this court has little trouble finding Carter's testimony of the accomplice's statement reliable and trustworthy.

This proposition of law is not well taken.

Accordingly, for the reasons stated, the judgment of the Court of Appeals is affirmed.

*Judgment affirmed.*

HERBERT, CELEBREZZE, W. BROWN, P. BROWN, SWEENEY and LOCHER, JJ., concur.



Appendix "B"

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| STATE OF OHIO | : | |
| | | NO. 77-127 |
| Plaintiff-Appellee, | : | |
| -vs- | : | |
| | | NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES |
| ELLIS SHELTON | : | |
| Defendant-Appellant. | : | |

Ellis Shelton, Defendant-Appellant herein, gives notice to this Court of his Appeal to the Supreme Court of the United States of America from the order of this Court entered on the 13 day of July, 1977, affirming said Defendant-Appellant's conviction of the crime of aggravated murder and attempted aggravated robbery, and the sentence of death imposed upon him therein, for the reason that the imposition of the death penalty upon this Defendant-Appellant in the manner provided in the within case and under the laws of the State of Ohio as they presently exists is unconstitutional, and thereby deprives this Defendant-Appellant of his right to live without due process and equal to protection of the law as is guaranteed to him by the Constitution of the United States of America.

Your Applicant further states that he is an indigent prisoner being detained at the Southern Ohio Correctional Facility at Lucasville, Ohio, and as an indigent, requires the appointment of competent and capable counsel to prosecute this Appeal.

Ellis Shelton

Ellis Shelton

NOTICE
TO THE CLERK: Supreme Court of the State of Ohio
Third Floor, Ohio State Office Building
Columbus, Ohio 43216

Please docket the within Notice of Appeal to the Supreme Court of the United States of America, as provided by law, and handle the disposition and transportation of all docket and journal entries, together with all papers, exhibits, briefs and memoranda in connection with the within pending case as provided in such cases.

Ellis Shelton
Ellis Shelton

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within Notice of Appeal to the Supreme Court of the United States has been served upon the Prosecuting Attorney of Hamilton County, Ohio, and the Clerk of the Supreme Court of the State of Ohio, by regular US mail this 18 day of August, 1977.

Ellis Shelton
Ellis Shelton



APPENDIX "C"

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| STATE OF OHIO | : | NO. 77-127 |
| Plaintiff-Appellee, | : | |
| -vs- | : | APPLICATION FOR APPOINTMENT OF COUNSEL TO PROSECUTE APPEAL |
| ELLIS SHELTON | : | |
| Defendant-Appellant. | : | |

Ellis Shelton respectfully moves this Court to appoint Counsel on his behalf to prosecute his Appeal as of right to the Supreme Court of the United States, appealing on questions of law the judgment of affirmance of this conviction entered on the 13 day of July, 1977, which judgment affirms his conviction of the crime of aggravated murder, having been heretofore entered herein in the Common Pleas Court of Hamilton County, Ohio, in Hamilton County, Ohio, in Case No. B743590.

Your Applicant further states that he is indigent and without funds to hire or secure privately retained counsel, and that he does require the assistance of Court appointed counsel in perfecting his Appeal of right to the United States Supreme Court as set forth herein above.

Ellis Shelton
Ellis Shelton

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within Application for Appointment of Counsel to Prosecute Appeal has been served upon the Prosecuting Attorney of Hamilton County, Ohio, and the Clerk of the Supreme Court of the State of Ohio, by regular US mail on this 18 day of August, 1977.

Ellis Shelton
Ellis Shelton

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77-5708

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

| | | |
|---|---|---|
| ELLIS SHELTON, | : | Miscellaneous Docket No.A-334 |
| Petitioner | : | Case No. 77-5708 |
| v. | : | |
| STATE OF OHIO, | : | |
| Respondent | : | |

ON APPEAL FROM SUPREME COURT OF OHIO

AMENDMENT TO

JURISDICTIONAL STATEMENT OF
PETITIONER

ELLIS SHELTON Pro Se Assisted by
ALLEN BROWN as Volunteer Counsel
at the request of Ohio Civil
Liberties Union
216 E. 9th Street, Fifth Level
Cincinnati, Ohio 45202

VOLUNTEER COUNSEL FOR
PETITIONER

Ellis Shelton, appearing pro se with assistance of volunteer counsel provided by the Ohio Civil Liberties Union, Allen Brown, amends his jurisdictional statement heretofore filed in the following particular:

There appears on page 2 of the heretofore filed memorandum captioned JURISDICTION, as statement as to jurisdiction.

To the end of such paragraph the following sentence should be added:

Jurisdiction is further asserted under 28 U. S. Code 2103. The Court is asked to treat this Memorandum in Support of Jurisdiction as if a Petition for Certiorari to the extent that the Court in its discretion deems that is appropriate filing.

Respectfully submitted,

Ellis Shelton Pro Se Assisted by
ALLEN BROWN as Volunteer Counsel
at the request of Ohio Civil
Liberties Union
216 E. 9th Street, Fifth Level
Cincinnati, Ohio 45202

VOLUNTEER COUNSEL FOR PETITIONER